UNITED STATES OF AMERICA	)	
	)	**Prosecution Motion**
v.	)	
	)	**for Appropriate Relief to Preclude**
Manning, Bradley E.	)	**Actual Harm or Damage from the**
PFC, U.S. Army,	)	**Pretrial Motions Practice and**
HHC, U.S. Army Garrison,	)	**the Merits Portion of Trial**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**29 March 2012**

RELIEF SOUGHT

The United States respectfully requests that the Court preclude the defense from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to actual harm or damage from pretrial motions related to the merits portion of trial and from the merits portion of trial. The United States does not dispute whether actual harm or damage is relevant on sentencing. The United States requests oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. See Manual for Courts-Martial, United States, Rule for Courts-Martial (R.C.M.) 905(c)(1) (2008). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the United States as the moving party. See R.C.M. 905(c)(2). Whether the Court rules on the admissibility of evidence before it arises at trial is a decision in the discretion of the military judge. See R.C.M. 906(b)(13).

FACTS

The accused is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030, and five specifications of violating a lawful general regulation, in violation of Article 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Enclosure 1.

The accused is alleged to have engaged in misconduct relating to, *inter alia*, more than 127 records, files, or cables and four databases, consisting of more than 720,700 records. See id. In response, multiple government agencies and departments *immediately* began measuring what, if any, harm or damage transpired because of the alleged misconduct. Some of those agencies and departments prepared damage assessments to memorialize their findings, including the Information Review Task Force and WikiLeaks Task Force. See Enclosure 2.

On 16 February 2012, the defense submitted its Motion to Compel Discovery for the damage assessments. See Enclosure 3. The defense argued that the damage assessments were

"at odds with the classification review conducted by the OCA" and that the substance "would undercut the testimony of each Original Classification Authorities (OCAs) for the charged documents." See id. The defense concluded, both in its Motion to Compel Discovery and at the public motions hearing, that the damage assessments were material to the preparation of the defense for both the merits and sentencing, citing articles indicating that the compromised information "caused only limited damage." See id.

On 23 March 2012, the military judge ordered the United States to produce, *inter alia*, any unclassified, discoverable information from those assessments and to "immediately begin the process of producing the damage assessments that are outside the possession, custody, or control of military authorities." See Enclosure 2. The United States is in the process of producing those assessments, or portions thereof, ordered by the military judge.

Producing a damage assessment generally requires the owner of the information to engage in a four-step process: first, verify the classification of the information; second, reevaluate the classification of the information; third, determine whether there are countermeasures to minimize or eliminate the damage to national security; and fourth, prepare the actual damage assessment. See Enclosure 4.

A damage assessment measures, "given the nature of the information and the countermeasures, if any, that will be employed, [] the probable impact the compromise will [have] on our national security." Producing a damage assessment "is sometimes a long-term, multi-disciplinary analysis of the adverse effects of the compromise on systems, plans, operations, and/or intelligence." Id.

WITNESSES/EVIDENCE

The United States does not intend to produce any witnesses for this motion. The United States requests that the Court consider the following enclosures to this Motion in making its ruling.

1. Charge Sheet (enclosed in record)
2. Ruling: Defense Motion to Compel Discovery, 23 March 2012 (Appellate Exhibit XXXVI)
3. Defense Motion to Compel Discovery, 16 February 2012 (Appellate Exhibit VIII)
4. Army Regulation 380-5, Paragraph 10-5, 29 September 2000

LEGAL AUTHORITY AND ARGUMENT

The Court should preclude the defense from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to actual harm or damage from pretrial motions related to the *merits* portion of trial and from the *merits* portion of trial. Actual harm or damage is not relevant for the reasons proffered by defense, to the charges facing the accused, or to any available defenses thereto. Even if relevant, the probative value of actual harm or damage is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See M.R.E. 403.

I. ACTUAL HARM OR DAMAGE IS NOT RELEVANT FOR THE REASONS PROFFERED BY DEFENSE.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Manual for Courts-Martial, United States, Mil. R. Evid. 401 (2008); see also M.R.E. 401, analysis ("relevant evidence must involve a fact 'which is of consequence to the determination of the action'").

The defense argued in its Motion to Compel Discovery that the damage assessments (the proffered authority which confirms whether actual harm or damage transpired) are relevant for two reasons. See Enclosure 3. First, the defense argued that the damage assessments "would undercut the testimony of each Original Classification Authorities for the charged documents." See id. The defense appears to be conflating the issues of damage and potential impact on national security. The two topics are distinct. Classification reviews are forward-thinking where the "original classification authority determines [whether] the unauthorized disclosure of the information reasonably could be expected to result in damage to national security." Exec. Order No. 13,526 § 1.2(a)(4). In contrast, damage assessments are prepared in hindsight to determine the actual impact, if any, caused by the illegal activity. See United States v. Lonetree, 31 M.J. 849, 868 (N-M C.M.R. 1990); see also Enclosure 4 (damage assessments "determine, given the nature of the information and countermeasures, if any, that will be employed, what the probable impact of the compromise will be on our national security"). Thus, the use of a damage assessment (i.e., whether damage *did* occur) to impeach an OCA who prepared a classification review (i.e., whether damage *could* occur) would be improper.

Second, the defense argued that the damage assessments were "at odds with the classification review conducted by the OCA." See Enclosure 3. Such "non-justiciable" questions, namely challenges to the classification of compromised information for which a classification review exists, are not relevant on the merits. See United States v. Huet-Vaughn, 43 M.J. 105, 114 (C.A.A.F. 1995) (the legality of the decision to employ military forces in the Persian Gulf was "irrelevant because it pertained to a non-justiciable political question"). Damage assessments may be relevant to impeach an OCA, but only if the OCA authored the document and only with respect to the assessment, not the classification review. See R.C.M. 914.

Information may be originally classified only if done so by an original classification authority. Exec. Order No. 13,526 § 1.1(a). Additionally, the information must be owned by, produced by or for, or under the control of the United States Government and must fall within one or more of the categories of following categories: military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert action), intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear

materials or facilities; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or the development, production, or use of weapons of mass destruction. See Exec. Order No. 13,526 §§ 1.1(a), 1.4(a)-(h). Finally, the OCA must determine "that the unauthorized disclosure of the information *reasonably could be expected to result in damage to the national security*" and be able to identify or describe the expected damage. See Exec. Order No. 13,526 § 1.1(a) (emphasis added).

OCAs make their classification designations based on their authority under Executive Order 13526, Classified National Security Information (signed by President Barack Obama on 29 December 2009) or for materials classified prior to 27 June 2010 on Executive Order 12958 (signed by President Clinton on 17 April 1995 and amended by Executive Order 13292 signed by President Bush on 25 March 2003), as well as relevant classification guides.

The authority to classify information is limited to (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of section 1.3(a). See Exec. Order 13,526 § 1.3(a).

The President delegated the authority to make classification determinations to heads of select agencies and it remains an Executive function. Department of Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The authority has been held in the relevant agencies because they have the expertise to review the information and determine the potential impact the release of that information would have on the United States as well as who can have access to that information. Id.; see, e.g., CIA v. Sims, 471 U.S. 159, 176 (1985) ("[A] court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments. . . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of the judges to make those judgments correctly.").

Courts largely agree that classification determinations, as products of the Executive Branch, should be presumed proper and not subject to great judicial scrutiny. See Haig v. Agee, 453 U.S. 280, 291 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); see also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (such matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). The decision of owner of the information must be given great deference. See Sims, 471 U.S. at 176 ("[t]he decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake"). The Fourth Circuit provides such great deference to the classification determination that courts largely do not question the determination. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . .").

Even assuming, *arguendo*, the classification determination is subject to judicial scrutiny, the judicial review of this determination, much like that of a military judge's ruling, should be based on what information was before the OCA at the time of making the determination. See United States v. Phillips, 52 M.J. 268, 272 (C.A.A.F. 2000) (a judge's ruling should be reviewed based on what was available to the judge at the time of ruling). Any fact occurring after this determination, to include whether any damage actually transpired, is irrelevant.

II. ACTUAL HARM OR DAMAGE IS NOT RELEVANT TO THE CHARGES FACING THE ACCUSED.

Actual harm or damage does not "make the existence of any fact that is of *consequence to the determination of the action* more probable or less probable than it would be without the evidence." M.R.E. 401 (emphasis added). In Huet-Vaughn, the accused was charged with desertion with intent to avoid hazardous duty. See Huet-Vaughn, 43 M.J. at 114. The Government filed a motion to preliminarily exclude any evidence relating to the accused's motive for her misconduct. The trial court precluded the defense from presenting evidence relating to the accused's motive. The Court of Appeals for the Armed Forces (CAAF) agreed that such evidence was irrelevant because, *inter alia*, it did not "tend to make her [*mens rea*] more or less probable." Huet-Vaughn, 43 M.J. at 114 (the accused's motive was irrelevant to the requisite intent of the crime, thus not relevant); see also United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969) (motive not relevant to element of "willful intent" in destroying board records, "but is rather an element proper for the judge's consideration in sentencing").

The law does not require the United States to prove that actual harm or damage occurred in its case-in-chief, in light of the charges facing the accused. See Enclosure 1. Actual harm or damage, including the absence thereof, is not an element, or relevant to any element, of any offense for which the accused is charged. See id. The extent of actual harm or damage that occurred bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Charge I (Article 104, UCMJ) requires that the United States prove, *inter alia*, that the accused did "knowingly give intelligence to the enemy, through indirect means." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of this charge. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offense.

Specification 1 of Charge II (Article 134, UCMJ) requires that the United States prove, *inter alia*, that the accused did "wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of this specification. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II (Article 134, UCMJ) require that the United States prove, *inter alia*, that the accused had unauthorized possession of information relating to the national defense and, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, did "willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S.C. § 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of these specifications. The CAAF in Diaz supports this position. See United States v. Diaz, 69 M.J. 127 (C.A.A.F. 2010).

In Diaz, the accused was charged with violating, *inter alia*, 18 U.S.C. § 793(e). The Government filed a motion *in limine* to exclude evidence which, on appeal, the defense argued could have been offered to negate the alleged "heightened *mens rea* requirement" under 18 U.S.C. § 793. The Court rejected the defense's argument because the language of the statute, specifically that the accused "has reason to believe [that the information] *could be used* to the injury of the United States" and do so with "willfulness," did not arise "in the context of bad intent, but in the conscious choice to communicate covered information." Id., at 132. This reasoning supported the Fourth Circuit's decision in Morison that the government must only prove "that [the compromised information] was in fact *potentially* damaging." United States v. Morison, 844 F.2d 1057, 1086 (4th Cir. 1988) (emphasis added). In sum, the CAAF adopted the ruling in Morison that, under 18 U.S.C. § 793(e), the United States need only prove, *inter alia*, that the accused had reason to believe the information "could be used to the injury of the United States[,]" or, put another way, that the information was "potentially damaging" – not that damage actually transpired. See Diaz, 69 M.J. at 132.

Any actual harm or damage, the existence of which may only be confirmed through witness testimony or other documentation, such as a damage assessment, is not relevant to whether select documents were classified (a fact captured through testimony relating to a classification review) and/or relate to national defense information. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Specifications 4, 6, 8, 12, and 16 of Charge II (Article 134, UCMJ) require that the United States prove, *inter alia*, that the accused did "steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof...of a value of more than $1,000, in violation of 18 U.S.C. § 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of these specifications. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Specifications 13 and 14 of Charge II (Article 134, UCMJ) require that the United States prove, *inter alia*, that the accused, "having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained

information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations," did "willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S.C. § 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of these specifications. For the reasons set forth above, any actual harm or damage, the existence of which may only be confirmed in a damage assessment, is not relevant to whether select documents were classified (a fact captured through testimony relating to a classification review) and/or relate to national defense information. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Specifications 1-5 of Charge III (Article 92, UCMJ) require that the United States prove, *inter alia*, that the accused did "violate a lawful general regulation." Id. The violations include "attempting to bypass network or information system security mechanisms," "adding unauthorized software to a SIPRNET computer," "using information system in a manner other than its intended purpose," and "wrongfully storing classified information." Id. Actual harm or damage, including the lack thereof, caused by the misconduct is neither an element nor relevant to an element of these specifications. The extent of harm or damage that transpired bears absolutely no relationship to whether the accused, in fact, committed the offenses.

Any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to actual harm or damage is not relevant to pretrial motions related to the merits portion of trial and to the merits portion of trial. The Court should preclude any attempt by the defense to taint the proceeding with irrelevant issues during pretrial motions focused on the merits and during the merits portion that are only relevant, if at all, on sentencing. See R.C.M. 1001(b)(4); see also R.C.M. 1001(c).

III. ACTUAL HARM OR DAMAGE IS NOT RELEVANT TO ANY DEFENSE AVAILABLE TO THE ACCUSED.

Actual harm or damage does not "make the existence of any fact that is of *consequence to the determination of the action* more probable or less probable than it would be without the evidence." M.R.E. 401 (emphasis added). The extent of harm or damage that subsequently transpired bears absolutely no relationship to any legal defense, or relevant to any conceivable legal defense, available to the accused. See Huet-Vaughn, 43 M.J. at 115 (the accused's motive was "in no way a defense to this [action] and therefore [] not relevant[,]" rejecting a necessity defense and the so-called Nuremberg defense).

IV. IN THE ALTERNATIVE, THE FACTORS UNDER MRE 403 SUBSTANTIALLY OUTWEIGH ANY PROBATIVE VALUE OF ACTUAL HARM OR DAMAGE ON PRETRIAL MOTIONS RELATED TO THE MERITS PORTION OF TRIAL AND ON THE MERITS PORTION OF TRIAL.

Even assuming, *arguendo*, actual harm or damage is relevant to the merits, such evidence is substantially outweighed by those factors under MRE 403 and Berry. See M.R.E. 403; see also United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (enumerating the factors under the MRE 403 balancing test). The military judge may exclude otherwise relevant evidence, if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403.

A. Permitting the Defense to Raise Unsupported Arguments Relating to Whether Actual Harm or Damage Transpired at Pretrial Motions Related to the Merits or on the Merits Will Result in Prejudice to the Integrity of the Proceeding.

MRE 403 "addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness." United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009). The "term 'unfair prejudice' in the context of MRE 403 'speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.'" United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) (citing Old Chief v. United States, 519 U.S. 172, 180 (1997) (analyzing the purpose behind Federal Rule of Evidence 403, which is identical to MRE 403)); see also M.R.E. 403, analysis (MRE 403 "is taken without change from the Federal Rule of Evidence"). Evidence of actual harm or damage, including lack thereof, will create "an undue tendency to suggest decision on an improper basis" and lure the fact finder into declaring guilt or innocence, irrespective of the evidence supporting the charges. See Gaddis, 70 M.J. at 254 (citing Fed. R. Evid. 403, advisory committee's notes). Further, any argument by the defense that no damage occurred is inconsistent with what the United States has produced to the defense in discovery.

B. Permitting the Defense to Raise Unsupported Arguments Relating to Whether Actual Harm or Damage Transpired at Pretrial Motions Related to the Merits or on the Merits Will Result in Prejudice the United States.

If the Court permits the defense to raise or elicit unsupported arguments relating to actual harm or damage during pretrial motions practice focused on the merits and on the merits, the United States would be greatly prejudiced. See R.C.M. 906(b)(13), discussion (the purpose of a motion to make a preliminary ruling on the admissibility of evidence "is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members"). Actual harm or damage resulting from the compromised information is likely classified information. Assuming, *arguendo*, the defense continues its unsupported arguments that actual harm or damage did not occur in open court, the United States is unable to rebut the defense's argument with classified information without satisfying the requirements for a closed session under RCM 806, assuming the government entities who own the information authorize its use. See R.C.M. 806; see also United States v. Grunden, 2 M.J. 116 (C.M.A. 1977). Furthermore, this would be a

new form of graymailing, whereby the government entities who own information relating to actual harm or damage would be forced to approve the use of this classified information for the sole purpose of rebutting the defense's argument, or otherwise have the prosecution be unable to answer the defense's accusations in open or closed session by protecting the information from disclosure. For these reasons, the Court should exclude actual harm or damage under MRE 403.

C. The Balancing Test under MRE 403 Confirms that the Court Should Exclude Actual Harm or Damage from Pretrial Motions Related to the Merits and to the Merits.

MRE 403 requires the military judge to conduct a balancing test of, *inter alia*, the strength of the proof of the fact, the probative weight of the evidence, the potential to present less prejudicial evidence, the possible distraction of the fact-finder, the time needed to prove the fact, and the presence of intervening circumstances. See Berry, 61 M.J. at 95. Assuming, *arguendo*, the Court finds that actual harm or damage is relevant to any pretrial motions hearing focused on the merits and on the merits, the balancing test confirms that the Court should exclude actual harm or damage from any pretrial motions hearing focused on the merits and the merits.

The Court may consider the strength of the proof of fact in conducting its balancing test under MRE 403. See Berry, 61 M.J. at 95. Damage assessments confirm whether, and to what extent, actual harm or damage may have occurred. However, a damage assessment is a purely hearsay statement or compilation of statements, thus likely inadmissible on its face. The strength of the proof of fact is weak, absent additional evidence to overcome hearsay. Being a classified document, the government entity that owns the information would be required to decide whether to assert the privilege under MRE 505. If the privilege is sought, a classification review would be required and the proceedings under MRE 505 would be initiated. Irrespective of whether the privilege is sought or asserted, the document is likely inadmissible on its face as pure hearsay, which may require the offering of additional evidence to overcome hearsay. Lastly, a closed hearing under RCM 806 would be required to discuss whether actual harm or damage transpired. See R.C.M. 806; see also Grunden, 2 M.J. at 116. Being a classified document with admissibility concerns, the time needed to prove whether actual harm or damage transpired during any pretrial motions hearing focused on the merits and during the merits may stalemate the proceeding.

The Court should also consider whether the information would operate to distract the fact finder, rather than assist in the decision-making process. See Berry, 61 M.J. at 95. Whether the accused's misconduct resulted in actual harm or damage would greatly distract the fact-finder from determining whether the accused committed the alleged offenses and, instead, lure the panel members to make a decision based purely on damage, not misconduct. Actual harm or damage may be a legitimate consideration of the panel on sentencing, *but not* on the merits.

CONCLUSION

The United States respectfully requests that the Court preclude the defense from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to actual harm or damage from pretrial motions related to the merits portion of trial and from the merits portion of trial.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 29 March 2012.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel